BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEGGY BAKER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 184,759 & 195,526
MEADOWBROOK MANOR	)	
Respondent	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

The respondent and claimant both appealed from an Award entered by Special Administrative Law Judge William F. Morrissey on April 11, 1997. The Appeals Board heard oral argument September 3, 1997.

APPEARANCES

Claimant appeared by attorney Diane F. Barger of Wichita, Kansas. Respondent and its insurance carrier appeared by attorney Kip A. Kubin of Overland Park, Kansas.

RECORD AND STIPULATIONS

The record considered by the Board and the stipulations of the parties are listed in the Award.

ISSUES

The appealed Award includes two separate claims. Docket No. 184,759 relates to an alleged back injury on June 16, 1993. The second claim, Docket No. 195,526, relates to a back injury approximately one year later on June 21, 1994. The Award grants no permanent partial disability benefits for the second injury. At the time of oral argument, claimant's counsel stated that the second accident was a temporary aggravation only and

that claimant does not appeal any issues to the second injury, Docket No. 195,526. For Docket No. 184,759 relating to accidental injury on June 16, 1993, the Award granted claimant benefits based on a 56 percent work disability. Both parties raise issues relating to this award.

Respondent contends the award should be based on functional impairment only because of the presumption of no work disability applied when a claimant returns to work at a comparable wage. K.S.A. 1992 Supp. 44-510e. The Kansas Court of Appeals has held that the presumption will also apply to a claimant who refuses to attempt a comparable wage job when the evidence establishes that he or she could perform that job. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). According to respondent, claimant is capable of returning to work at a comparable wage, did in fact return to work at a comparable wage for a brief period, and is not now working at a comparable wage only because she allowed her medication aid license to lapse. On that basis, the respondent asked that the presumption be applied here.

If work disability is awarded, respondent contends the Special Administrative Law Judge erred in failing to consider the restrictions recommended by Dr. Joseph Huston. Finally, respondent contends the Special Administrative Law Judge should have, under K.S.A. 44-501(c), deducted preexisting functional impairment from the disability awarded.

Claimant argues the case should be remanded for rebuttal testimony. Dr. P. Brent Koprivica testified that claimant gave him a history of ongoing back problems from a prior injury. Claimant's counsel indicates claimant would testify she did not have any such ongoing problems. Claimant also contends that based upon the record as it presently exists, a higher work disability should be awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board computes that the Award should be modified. The Appeals Board agrees that claimant is entitled to a work disability and that the finding of 56 percent work disability fairly assesses claimant's disability. But the Appeals Board agrees that 8 percent should be deducted for the preexisting impairment. For the reasons stated below, the Board finds that the case should not be remanded for further testimony.

Claimant worked as a certified nurse's aid (CNA) for respondent, Meadowbrook Manor. She bathed, fed, and put the residents to bed. She lifted patients out of bed and into a wheelchair and in and out of bathtubs. She also lifted and turned mattresses.

On June 16, 1993, claimant injured her low back while lifting a resident. Claimant tripped over a footstool and fell. The resident fell on her. Claimant's injury eventually required surgery. Dr. Huston performed a laminectomy at L5-S1 and L4-5 on February 7, 1994. Claimant returned to work for respondent on May 31, 1994.

Upon her return, claimant worked for a brief period as a certified medication aid (CMA). The job required less lifting. She passed medication and provided skin and foot care for the patients. Claimant testified and the record otherwise confirms that a person working as a CMA for respondent must also be able to perform the patient lifting duties on an as needed basis to fill in for or assist the CNAs.

Sometime shortly after claimant returned to work it was discovered claimant's license to pass medications had lapsed. Respondent then assigned other general duties and on June 21, 1994, claimant reinjured her back while stripping wallpaper. This second accident was the subject of Docket No. 195,526. As indicated, claimant now acknowledges this second accident, an aggravation of the original injury, was temporary only.

For the second injury, claimant was again treated by Dr. Huston. After conservative treatment, he released her with restrictions. Dr. Huston's records are not in evidence and he did not testify. Claimant testified that Dr. Huston released her with restrictions and respondent then advised her it had no employment for her. Respondent offers no evidence that contradicts claimant's testimony on this point.

Respondent now contends that claimant could and would have been performing work as a CMA for respondent at a wage comparable to her pre-injury wage except for the fact that she let her license lapse. Respondent asks the Board to treat claimant as though she were earning a comparable wage in accordance with the Foulk decision. The Board finds, however, that claimant would not have been physically able to return to the duties as either a CNA or a CMA following her injury. The record reflects that the duties of a CNA involve working more frequently and directly with patients, including lifting and moving patients. The CMA, on the other hand, dispenses medications. A CMA working for respondent must, however, assist the CNA with moving patients on an as needed basis.

The only physician to testify in this case was Dr. Koprivica. He initially testified that claimant could return to work as a CMA. But when advised of claimant's testimony about the duties of the CMA, Dr. Koprivica agreed that claimant could not do the work of lifting the patients required of the CMA working for respondent. The Board finds that the principles stated in Foulk do not apply here.

Claimant has not refused acceptable employment at a comparable wage. The employment was not available and claimant would not have been able to perform the duties. The lapse of her licensing was the reason she did not perform those duties for the brief period of time she did return to work for respondent after her surgery. Claimant provides uncontradicted testimony that it lapsed because she was not aware of the renewal date. According to claimant, the employer normally kept track of those matters. Claimant had been off work because of her injury and was unaware that the license had lapsed. However, as indicated, the Board finds that claimant would not have been offered or been able to perform the duties even if she had such a license.

Respondent next contends that the Special Administrative Law Judge erred by not considering the restrictions recommended by the treating physician, Dr. Huston. Dr. Huston did not testify in this case and his records were not otherwise admitted into evidence. Respondent relies upon the decision by the Kansas Court of Appeals in Roberts v. J.C. Penney Co., 23 Kan. App. 2d 789, 935 P.2d 1079 (1997). In Roberts, the Court of Appeals found that the vocational expert could rely upon the medical records not otherwise introduced into the record. After the present case was argued to the Board, the Roberts decision was reversed by the Kansas Supreme Court in an opinion filed on December 12, 1997. The Special Administrative Law Judge could not, therefore, rely on those opinions of vocational experts in this case based upon the restrictions of Dr. Huston, restrictions which were not otherwise introduced into the record.

Finally, respondent contends that the Special Administrative Law Judge erred when he failed to subtract from his award the amount of the preexisting functional impairment as stated by Dr. Koprivica. Dr. Koprivica rated claimant's functional impairment as 23 percent to the body as a whole and testified that 8 percent of that impairment preexisted this injury. K.S.A. 44-501(c) requires the preexisting functional impairment be deducted in all cases:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Claimant contends Dr. Koprivica's evaluation of preexisting impairment was nothing more than speculation. Claimant notes Dr. Koprivica did not see the claimant before this injury. Respondent, on the other hand, contends that it is not necessary in all cases for the physician to see the claimant to make an evaluation of preexisting impairment.

The Appeals Board agrees that an evaluation of preexisting impairment does not, in all cases, require that the physician examine the claimant before the injury at issue. In this case, Dr. Koprivica had the opportunity to see the x-rays taken before this injury and a report of a CT scan done before this injury. Those records reflected degenerative changes and bulging discs. Claimant's counsel pressed Dr. Koprivica at his deposition but Dr. Koprivica testified that his opinion was not mere speculation. The Board finds his uncontradicted opinion to be a reasonable one in this case and agrees that the preexisting 8 percent impairment should be deducted from the disability found.

The Special Administrative Law Judge arrived at his conclusion as to the nature of the disability by giving equal weight to the opinions of two vocational experts, Gary Weimholt and Bud Langston. He used only those opinions which relied upon the restrictions by Dr. Koprivica because Dr. Huston's were not in evidence. Mr. Weimholt concluded that if claimant were limited, as Dr. Koprivica testified, to a sedentary category of work then she would have an 89 to 90 percent loss of access to the open labor market. Mr. Langston also testified that claimant had an 85 to 90 percent loss of access to the open labor market. The Special Administrative Law Judge considered both opinions and found

that claimant had suffered a 90 percent loss of ability to perform work in the open labor market. The Appeals Board agrees.

Mr. Langston concluded claimant had a 26 percent loss of ability to earn wages comparable to those she had earned at the time of the accident. Mr. Weimholt believed the loss was between 10 percent and 25 percent. Again, giving approximately equal weight to those opinions, the Special Administrative Law Judge found claimant had a 22 percent loss of ability to earn wages. The Appeals Board also finds this to be reasonable and adopts the finding as its own.

The Special Administrative Law Judge then gave equal weight to the wage loss and labor market factors. The Board agrees the result is 56 percent disability. From this, the Appeals Board finds the 8 percent preexisting functional impairment should be deducted. Claimant is therefore entitled to benefits based upon a 48 percent work disability.

Claimant's counsel has asked that this case be remanded to allow for claimant to testify in rebuttal to statements made by Dr. Koprivica in his deposition. The Special Administrative Law Judge conducted a hearing on this issue on May 15, 1996. At that time, claimant's counsel noted that Dr. Koprivica had testified to a medical history with which claimant would disagree. Dr. Koprivica testified that claimant advised him that she had an ongoing problem with her low back from a 1992 injury. Claimant's counsel advised the Court that claimant would testify the problems had resolved and she did not have any ongoing problem at the time of this injury. These facts have some relevance to the question of preexisting impairment.

The Board concludes, however, that remand is not necessary or appropriate in this case. First, the relevance of the prior medical history should not have been and undoubtedly was not a surprise issue. Claimant's counsel would have known at the time claimant testified that this was an issue to be addressed. This does not, however, rule out the potential that the issue will take an unexpected turn. Dr. Koprivica's report mentions a preexisting chronic back problem. He testifies more specifically to an ongoing problem. The Board finds, however, that this issue is adequately addressed in the deposition testimony given by claimant. At the discovery deposition in this case, claimant attested that she was not having problems prior to the current injury. The proposed remand would provide little more than accumulative evidence. In spite of that testimony, the Board has found credible Dr. Koprivica's opinion that claimant had a preexisting impairment of 8 percent.

AWARD

WHEREFORE, the Appeals Board finds that the Award by Special Administrative Law Judge William F. Morrissey, dated April 11, 1997, should be, and the same is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Peggy Baker, and against the respondent, Meadowbrook Manor, and its insurance carrier, Commercial Union Insurance Companies, for an accidental injury which occurred June 16, 1993, and based upon an average weekly wage of $267.35 for 57 weeks of temporary total disability compensation at the rate of $178.24 per week or $10,159.68, followed by 4.77 weeks of temporary partial disability compensation at the rate of $178.24 per week in the sum of $850.20, followed by 353.23 weeks at the rate of $85.56 per week or $30,222.36, for a 48% permanent partial work disability, making a total award of $41,232.24.

As of March 31, 1998, there is due and owing claimant 57 weeks of temporary total disability compensation at the rate of $178.24 per week or $10,159.68, followed by 4.77 weeks of temporary partial disability compensation at the rate of $178.24 per week in the sum of $850.20 and 188.09 weeks of permanent partial compensation at the rate of $85.56 per week in the sum of $16,092.98 for a total of $27,102.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $14,129.38 is to be paid for 165.14 weeks at the rate of $85.56 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders in the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this _____ day of March 1998.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Kip A. Kubin, Overland Park, KS
William F. Morrissey, Administrative Law Judge
Philip S. Harness, Director